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October 29, 2008

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Ex Parte Presentation, MB Docket No. 07-198

Dear Chairman Martin:

By and through its undersigned counsel, Viacom Inc. ("Viacom") hereby submits this written *ex parte* presentation in response to the letter sent to you by Matthew M. Polka of the American Cable Association ("ACA") on September 8, 2008 as part of the above-captioned proceeding.¹ *The single most important take away from the ACA Letter is ACA's **admission** that programmers such as Viacom do not compel cable operators to carry multiple channels in order to get access to high-value, popular programming services.* Indeed, the very premise of the ACA Letter is that networks are sold on a stand-alone basis. Thus, ACA has confirmed unequivocally that there is no "problem" warranting remediation by the Commission.

Throughout this proceeding, Viacom and other programmers have emphasized again and again that they offer all of their channels for sale on a stand-alone basis.² Although it conceded as much in its opening comments,³ ACA

¹ See Letter from Matthew M. Polka, President and CEO, American Cable Association, to The Honorable Kevin J. Martin, Chairman, Federal Communications Commission, MB Docket No. 07-198 (dated Sept. 8, 2008) (the "ACA Letter").

² See, e.g., Viacom Comments, at Appendix 2, Dr. Bruce M. Owen, Economists Incorporated, *Wholesale Packaging of Video Programming*, at 39-40 (Jan. 4, 2008); Reply Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., MB Docket No. 07-198 (filed Feb.

nonetheless repeatedly has pressed its case that programmers engage in forced “bundling” or “coercion.” Now, ACA once again admits that its members *can* (and in fact *do*) purchase networks on a stand-alone basis. ACA’s acknowledgement lays bare its true motive in this proceeding: an unwarranted invitation for government price regulation of the wholesale market for the distribution of video programming.⁴

The Commission, however, should make its decision in this proceeding based on the actual record evidence – which confirms that no coercion is occurring in the wholesale programming market – and not based on ACA’s constantly evolving positions.⁵

The ACA Letter also alleges that minority-oriented programming networks would benefit from governmental intervention in the competitive, free market for the wholesale distribution of video programming. Put simply, nothing could be further from the truth. While ACA offers scant support for its assertion, the docket in this proceeding overwhelmingly confirms that a government mandate to restrict the sale of programming networks in packages would pose an enormous threat to diverse programming in this country.

The Commission need not take Viacom’s word for it, although Viacom certainly has provided comprehensive examples of how the free market has enabled minority- and niche-targeted programming networks to develop and thrive.⁶

12, 2008), at 17; Reply Comments of NBC Universal, Inc. and NBC Telemundo License Co., MB Docket No. 07-198 (filed Feb. 12, 2008), at 21-25; Reply Comments of The Walt Disney Company, MB Docket No. 07-198 (filed Feb. 12, 2008), at 3-11 & Exhibit A, Jeffrey A. Eisenach, *Why the FCC Should Not Increase Regulation of Wholesale TV Programming: Reply to Comments in MB Docket No. 07-198*, at 12-17 (Feb. 12, 2008).

³ See ACA Comments, MB Docket No. 07-198 (filed Jan. 3, 2008), at 13.

⁴ See, e.g., *id.* at 21 (ACA arguing in favor of government regulation to “[e]nsur[e] . . . reasonable prices” for the purchase of stand-alone programming networks).

⁵ In any event, as Viacom and others have made clear, the Commission lacks authority to regulate the wholesale market for the delivery of video programming. See, e.g., Letter from Antoinette Cook Bush and Jared S. Sher to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-198 (dated Aug. 21, 2008).

⁶ See, e.g., Comments of Viacom Inc., MB Docket No. 07-198 (filed Jan. 4, 2008), at 13-14. As Viacom has explained, the sale of programming in packages has fostered the growth of diverse programming networks, including channels that target minority and niche audiences. Programmers often use packaging to ensure distribution of these networks that otherwise would find it extremely difficult to obtain cable carriage. By offering price discounts on more widely popular networks, a programmer such as Viacom can provide incentives to encourage cable systems to carry networks such as Noggin, which provides commercial-free programming to pre-school-aged children, LOGO, a network for the gay and lesbian community, and MTV Tr3s, a

Instead, the Commission should listen to the clarion call offered by a coalition of civil rights leaders, who have stressed that government regulation in this arena “would deliver [a] . . . devastating effect on programming enjoyed by minority communities, while offering no benefit to these audiences whatsoever.”⁷ Equally important, minority programmers themselves have pointed out that networks need “the freedom to offer volume discounts and channel packaging” if they want to have a chance of breaking into the competitive market.⁸

In short, notwithstanding the ACA Letter, it seems more appropriate that the Commission heed the warning offered by those actually engaged in producing, distributing and consuming minority-oriented programming than be comforted by ACA’s supposition that there would be no “significant negative impact on the availability of minority-interest programming as a result of wholesale unbundling”⁹ Indeed, civil rights leaders have explained that the “seismic effect of” regulations “would surely threaten the very existence of niche and minority programming.”¹⁰

network for the Latino community. If the Commission were to preclude or otherwise restrict Viacom and others from selling networks in packages, a number of diverse networks might never obtain cable carriage. ACA claims that Viacom does not typically package BET with Nickelodeon or MTV in its carriage agreements with small cable operators. ACA fails to acknowledge, however, that this arrangement predates Viacom’s acquisition of BET and ignores the fact that other Viacom-owned niche and minority-focused networks are offered in pro-competitive packages with Viacom’s most popular programming. Moreover, ACA’s assertions say nothing of the impact that government regulation would have on carriage of the variety of African-American-oriented channels that are offered for sale in a package with BET (such as BET Gospel and BET Jazz).

⁷ See Letter to Chairman Kevin J. Martin, *et al.* from Dr. E. Faye Williams, Esq., *et al.*, on behalf of National Congress for Black Women; A. Philip Randolph Institute; Hispanic Federation; Hispanic Technology & Telecommunications Partnership (HTTP); Labor Council for Latin American Advancement (LCLAA); Latinos in Information Sciences and Technology Association (LISTA); League of Rural Voters; League of United Latin American Citizens (LULAC); Minority Business Enterprise Legal Defense and Educational Fund; National Black Chamber of Commerce; National Black Justice Coalition; National Coalition of Latino Clergy & Christian Leaders; National Coalition on Black Civic Participation; National Council of Women’s Organizations; and National Gay & Lesbian Chamber of Commerce (NGLCC), MB Docket No. 07-42 (dated May 29, 2008), at 1 (“Civil Rights Letter”).

⁸ See, e.g., Reply Comments of TuTV, LLC, MB Docket No. 07-198 (filed Feb. 12, 2008), at 4.

⁹ ACA Letter, at 2.

¹⁰ Civil Rights Letter, at 2.

ACA laments what it calls the "misperceived notion" that minority-oriented programming would suffer under a wholesale a la carte regime. But civil rights leaders and programmers themselves are under no misperception, and the Commission should not simply dismiss their concerns by taking ACA's word for it that diverse programming would not be harmed.

The above-referenced proceeding has been accorded permit-but-disclose status, and this filing is made pursuant to Section 1.1206(b) of the Commission's rules. Should you have any questions concerning this submission, kindly contact the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Antoinette Cook Bush", with a stylized flourish at the end.

Antoinette Cook Bush
Jared S. Sher
Counsel to Viacom Inc.

cc: Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Commissioner Robert M. McDowell
Commissioner Deborah Taylor Tate